NO. 96585-4

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

LAKEHAVEN WATER AND SEWER DISTRICT, HIGHLINE WATER DISTRICT, and MIDWAY SEWER DISTRICT,

Appellants,

vs.

CITY OF FEDERAL WAY,

Respondent.

BRIEF OF *AMICI CURIAE* WASHINGTON STATE ASSOCIATION OF MUNICIPAL ATTORNEYS AND ASSOCIATION OF WASHINGTON CITIES IN SUPPORT OF RESPONDENT

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I. IDENTITY AND INTEREST OF *AMICI CURIAE*

The Washington State Association of Municipal Attorneys ("WSAMA") is a nonprofit Washington corporation whose membership is comprised of the attorneys who represent the 281 cities and towns in this state, and that provides education and training in the areas of municipal law to its members.

The Association of Washington Cities ("AWC") is a private non-profit corporation that represents Washington's cities and towns before the State Legislature, the State Executive branch and State regulatory agencies. Membership in the AWC is voluntary, however the association includes 100% participation from Washington's 281 cities and towns. A 25-member board of directors oversees AWC's activities. Its mission is to serve its members through advocacy, education, and services.

This case is vitally important to the members of WSAMA and AWC (collectively *Amici*). The 281 cities and towns within the state must be able to rely upon well-established precedent establishing the governmental/proprietary distinction in municipal functions for both taxation of other municipalities as well as nearly all other municipal functions. For over 100 years, cities and towns have relied on the precedent of this Court upholding the governmental/proprietary distinction in numerous municipal functions, including in determining the validity of

taxes upon other governmental entities. Abolishing, modifying, or ignoring the governmental/proprietary distinction for the reasons suggested by Appellants will have significant wide-reaching negative effects and unintended consequences on cities and towns. *Amici* respectfully request that this Court uphold the King County Superior Court's decision, uphold the governmental/proprietary distinction, and uphold the valid excise tax levied by the City of Federal Way pursuant to RCW 35A.82.020.

II. STATEMENT OF THE CASE

Amici adopt the Counterstatement of the Case provided and described by Respondent, City of Federal Way ("City").

III. ARGUMENT

The City has capably presented the issues and its arguments in connection with this case. It is not necessary for *Amici* to reiterate those arguments. Instead, the purpose of this brief of *Amici Curiae* is to inform the Court of the state-wide detrimental impact that the request of Appellants to abolish, modify, or ignore the governmental/proprietary distinction would have on cities, as well as other municipal and quasi-municipal entites throughout the state, and to request that this Court uphold the governmental/proprietary distinction for purposes of taxation between municipalities as well as in all other areas of municipal functions.

The issues before this Court involve more than just the imposition

of a tax by the City. Appellants seek to change a fundamental aspect of municipal law, namely abolishing or modifying the distinction between governmental and proprietary municipal functions. Abolishment or modification of the distinction, even for taxation purposes, involves issues of substantial public concern: (1) the governmental/proprietary distinction has been well-established for over 100 years and there is no basis to overturn precedent, (2) applying the distinction to taxation is consistent with the broad grant of taxing authority granted to code cities pursuant to Title 35A RCW under the home rule principle, and (3) abolishing or modifying the governmental/proprietary distinction, even just for taxation purposes, would have extensive and widespread negative consequences and create absurd results for municipalities. The King County Superior Court properly determined that the distinction is well-founded in the law and properly applied it to the City's excise tax on the proprietary activities of Appellants. The Supreme Court should uphold the decision of the King County Superior Court, maintain the governmental/proprietary distinction, and uphold the valid excise tax levied by the City.

A. The governmental/proprietary distinction is well established in case law and there is no basis to overturn precedent.

The King County Superior Court correctly ruled that Appellants are "governmental entities [that] act in both proprietary and governmental

capacities and that to the extent that income is derived from proprietary functions, the City…may through RCW 35A.82.020 impose the excise tax set forth under FMC 3.10.040." CP 1526-27. Yet Appellants have argued not only that the Superior Court's decision is improper, but that the basis – the governmental/proprietary distinction – is improper. App. Statement of Grounds at 9[1]; App. Br. at 12[2]. Abolishing the distinction as the Appellants request requires this Court to subvert the principles of *stare decisis* and to depart from over 100 years of established precedent.

1. The governmental/proprietary distinction is well-established precedent.

For over 100 years, Washington courts have recognized that governmental entities operate in one of two capacities – a governmental capacity or a proprietary capacity. *See City of Seattle v. Stirrat*, 55 Wash. 560, 564, 104 P. 834 (1909). The "principal test in distinguishing governmental functions from proprietary functions is whether the act performed is for the common good of all, or whether it is for the special benefit or profit of the corporate entity." *Okeson v. City of Seattle*, 150 Wn.2d 540, 550, 78 P.2d 1279 (2003). In discussing the distinction, this

[1] "This Court should directly review the trial court's decision to determine the proper scope of the governmental immunity doctrine in light of *Algona*, and *Wenatchee*, RAP 4.2(a)(3), and to determine *if the governmental/proprietary distinction in the context of the governmental immunity* makes sense…." *Id.*

[2] "The Court should not adopt what amounts to a proprietary services exception to the governmental immunity doctrine where the City did not make this distinction…."

Court has explained, "[w]hen the municipality undertakes to supply, to those inhabitants who will pay therefor, utilities and facilities of urban life, it is engaging in business upon municipal capital and for municipal purposes, but not in methods hitherto considered municipal. It is a public corporation transacting private business for hire." *Stirrat*, 55 Wash. at 565.

Operating a water and sewer utility has consistently been considered to be a proprietary function for over 100 years. *See id.* at 566 ("The power to grade streets, *lay sewers or water pipes*, and to lay the cost thereof upon abutting property is not a governmental or public function in the strict sense."); *Bjork v. City of Tacoma*, 76 Wash. 225, 228, 135 P. 1005 (1913) ("The city, in the maintenance and operation of its waterworks, was acting in a proprietary and not governmental capacity."); *Aronson v. City of Everett*, 136 Wash. 312, 316, 239 P. 1011 (1925) (same); *Russell v. City of Grandview*, 39 Wn.2d 551, 553, 236 P.2d 1061 (1951) ("Cities are limited governmental arms of the state, and when permitted by the state to engage in activities normally performed by private enterprise they to that extent depart from their governmental functions. The fact that some of the water is used in fire protection and in connection with health and sanitation is not material."); *Twitchell v. City of Spokane*, 55 Wash. 86, 89, 104 P. 150 (1909) (water rates are not taxes, but rather fees where the "consumer pays for a commodity which is furnished for his comfort and use."); *City of*

Wenatchee v. Chelan Cty. Pub. Util. Dist. No. 1, 181 Wn. App. 326, 325 P.3d 419 (2014) (city had authority to tax proprietary functions of PUDs).

2. Courts have recognized the distinction in allowing taxes on proprietary functions versus governmental functions.

Both parties have extensively briefed the validity of the City's utility tax[3] on the proprietary aspects of the Districts' utility operations. Without reiterating the same arguments, *Amici* highlight that this Court and lower Washington appellate courts have upheld utility taxes on governmentally operated proprietary utilities, such as water/sewer utilities like those at issue. *See Burba v. City of Vancouver*, 113 Wn.2d 800, 810, 783 P.2d 1056 (1989) ("The City of Vancouver's utility tax [on its water and sewer utility] is constitutional and properly assessed."); *see also Wenatchee*, 181 Wn. App. 326.

Appellants' argument that *Burba* is irrelevant discounts the fact that the court still considered the validity of a tax on a governmental utility. *Burba*, 113 Wn.2d at 810. Further, this Court has found that the governmental immunity doctrine prohibits taxes on *governmental* functions, absent the appropriate express statutory authority. *King County v. City of Algona*, 101 Wn.2d 789, 794, 681 P.2d 1281 (1984) ("[Algona]

[3] "Local taxation must be authority by a legislative delegation of taxing power." *Watson v. City of Seattle*, 189 Wn.2d 149, 165, 401 P.2d 1 (2017); *see* Wash. Const. art. VII, § 9, art. XI, § 12.

argues that governmental immunity should not apply because the [King] County operation of a solid waste transfer station is proprietary. This court has explicitly recognized that the disposal of solid waste is a governmental function. Where the primary purpose in operating the transfer station is public or governmental in nature, the county cannot be subject to the city B&O tax, absent express statutory authority."). Tellingly, lower appellate courts have utilized these cases to uphold a nearly identical excise tax. In *Wenatchee*¸ the court of appeals upheld Wenatchee's excise tax on domestic water sales after conducting an extensive review of the principles set forth by this Court in its relevant decisions, including *Burba* and *Algona*. *Wenatchee*¸ 181 Wn. App. at 333. Accordingly, this Court should continue to uphold the distinction it has historically recognized.[4]

3. Appellants have not met the high burdens to overcome *stare decisis.*

Stare decisis is the principle that "today's Court should stand by yesterday's decisions" and is 'a foundation stone of the rule of law.'" *Kimble v. Marvel Entm't, LLC*, 576 U.S. --, --, 135 S. Ct. 2401, 2409, 192

[4] *Amici* recognizes, as argued by Appellants and acknowledged by Respondent, certain aspects of the operation of a water/sewer utility have been considered to be governmental. *See, e.g., Lane v. City of Seattle*, 164 Wn.2d 875, 882, 194 P.3d 977 (2008) (maintenance of fire hydrants is a governmental function). The fact that some portions of the operations may be governmental does not change the fact that the underlying operation as a water/sewer utility is and has been determined to be proprietary. *See Okeson*¸ 150 Wn.2d at 550; *see also* Section III(D), *infra*.

L.Ed.2d 463 (2015). Critically, it allows local governments to rely on established precedent with an understanding and respect for those decisions, as well as recognition that they will not be overturned simply due to the proclivities of individuals. *Id.*[5]

In Washington, this Court has determined that to reject prior holdings on an "established rule," there must be "a clear showing that an established rule is incorrect and harmful." *State v. Otton*, 185 Wn.2d 673, 678, 374 P.3d 1108 (2016) (internal quotations omitted). The Court must determine that the "prior decision is so problematic that it must be rejected, despite the many benefits of adhering to precedent…." *Id.* Appellants have not met the high burden for overturning established precedent.

a) The governmental/proprietary distinction is not incorrect.

"Where a party asks this court to reject its previous decision, the party must show that the previous decision is incorrect." *Otton*, 185 Wn.2d at 681 (internal quotations omitted). Appellants have not shown that the governmental/proprietary distinction is incorrect, even when applied to the governmental immunity doctrine in cases of taxation.

[5] *See also Janus v. Am. Fed'n of State, Cty., and Mun. Emp.*, -- U.S. --, 138 S. Ct. 2448, 2497, 201 L.Ed.2d 924 (2018), (Kagan, J., dissenting) ("Consider first why these principles about precedent are so important…It 'promotes the evenhanded, predicatable, and consistent development' of legal doctrine. It fosters respect for and reliance on judicial decisions…And it 'contributes to the actual and perceived integriety of the judicial process,'…by ensuring that decisions are 'founded in the law rather than the proclivities of individuals.'") (citations omitted).

Appellants argue alternatively that either there is no express statutory authority for the City to tax its proprietary services, or that all of its services are governmental.[6] These arguments do not demonstrate that the underlying rule – that governments operate in dual capacity depending on the nature of their functions – is incorrect. Indeed, if the Appellants' arguments were true, then all governments and all of their functions would be considered *governmental*. It also ignores a critical aspect of the distinction, that "proprietary" does not mean to *in fact* be a business, but rather to operate similar to a business model based upon services provided to customers. *Stirrat*, 55 Wash. at 565-66 ("It is a public corporation transacting private business for hire. It is performing a function not governmental, but often committed to private corporations or persons, with whom it may come into competition. The function may be municipal, but the method is not."). It also ignores the importance of the distinction in other areas, such as determining appropriate statutes of limitations, tort liability, and authority to enter particular contracts, which would in fact create an unworkable framework for governmental operations. *See* Section III(D), *infra*. Further, this argument ignores the broad taxing authority

[6] Appellants argument that as a "governmental" entity, it is necessarily "governmental" does not demonstrate that all *functions* of the Appellants' operations are governmental, especially given that water/sewer utilities have historically been considered proprietary. *See, e.g., Okeson*, 150 Wn.2d at 550-51; *Russell*, 39 Wn.2d at 553; *Stiefel v. City of Kent*, 132 Wn. App. 523, 132 P.3d 1111 (2006).

granted to code cities pursuant to RCW 35A.82.020 under the home rule principle. *See* Section III(B), *infra*.

b) The governmental/proprietary distinction is not harmful.

A court will only reject precedent if it is both incorrect *and harmful*. *Otton*, 185 Wn.2d at 688. Appellants have not shown how the governmental/proprietary distinction is harmful or problematic. Indeed, Appellants' arguments seem to be based on the premise, as stated above, that as a governmental entity, all of its functions are governmental and thus the distinction is not appropriate. Further, they suggest that the distinction is inappropriate because it will prove difficult to apply or require significant reworking of their operations. The City's tax merely requires Appellants to determine which of their sources of income are from the "business" of providing water and sewer services for "commercial, industrial, or domestic use or purpose." FWRC 3.10.040(9), (10). CP 65-68, 1348, 1431, 1511. Appellants have not sought "clarification from Federal Way in determining these amounts[.]" CP 1347, 1511. Such statements do not demonstrate actual harm to either Appellants or their customers.

Accordingly, Appellants have not established that the governmental/proprietary distinction is either incorrect or harmful and there is no basis for this Court to reject prior precedent establishing that cities may tax other municipalities' proprietary functions.

B. The "home rule" principle supports the application of the governmental/proprietary distinction for taxation purposes.

The tax at issue in this case is part of the authority granted to code cities under the "home rule" principle. Accordingly, it is entirely consistent to apply the distinction when considering taxes levied on proprietary aspects of a municipality. The Respondent clearly articulated the broad authority the legislature sought to grant code cities pursuant to Title 35A RCW. Resp. Br. at 9. Yet Appellants argue that taxation was somehow excluded, despite the adoption of RCW 35A.82.020. App. Reply Br. at 6, n. 4. Appellants' argument fails to account for the clear statements provided by the Washington State Municipal Code Committee memorandum dated June 13, 1966 ("Code Committee Memo"). Specifically, the Code Committee Memo provides "Chapter 35A.11 contains a broad statement of rights, powers and privileges of the code cities which are classified as charter code cities and non-charter code cities. The chapter expresses the state legislature's *intent to confer the greatest power of local self-government, consistent with the State Constitution, upon the cities* and directs that the laws be *liberally construed in favor of the city as a clear mandate to abandon the so-called "Dillon's Rule" of construction.*" Memorandum from the Wash. State Municipal Code Comm. to the Washington State Legislature (June 13, 1966), p. 4 (emphasis added).

The Legislature expressed this through adoption of RCW 35A.01.010, which provides "[a]ny specific enumeration of municipal powers contained in this title or in any other general law *shall not be construed in any way to limit* the general description of power contained in this title, and *any such specifically enumerated powers shall be construed as in addition and supplementary* to the powers conferred in general terms by this title." (Emphasis added). The Legislature also required that "[a]ll grants of municipal power to municipalities electing to be governed under the provisions of this title, whether the grant is in specific terms or in general terms, *shall be liberally construed in favor of the municipality*." (Emphasis added).

Importantly, RCW 35A.11.020, adopted as part of the original adoption of the Optional Municipal Code, provided (and continues to provide) "[w]ithin constitutional limitations, legislative bodies of code cities shall have within their territorial limits *all powers of taxation for local purposes* except those *which are expressly preempted* by the state as provided in RCW 66.08.120, RCW 82.36.440, RCW 48.14.020, and RCW 48.14.080." RCW 35A.11.020 (emphasis added).[7]

The distinction between "Dillon's Rule" and "home rule" is critical

[7] RCW 35A.82.020 was also adopted in 1967 as part of the Optional Municipal Code, despite Appellants' assertion that taxation was not part of the issues considered in adopting the broad home rule authority through the Optional Municipal Code.

in the context of tax authority granted to code cities. While "Dillon's Rule" is a limiting rule, "home rule" is conversely an acknowledgement of the broadest authority granted to code cities and is the presumption that a municipal corporation's exercise of power is valid unless restricted by the constitution, charter, or statute. Hugh D. Spitzer, *"Home Rule" vs. Dillon's Rule" for Washington Cities*, 38 Seattle U. L. Rev. 809, 810 (2015); *see, also,* 2A Eugene McQuillin *The Law of Municipal Corporations* § 10:16 (3d ed. updated July 2019); *Watson*, 189 Wn.2d at 166-67 ("Home rule" is "shorthand for the presumption of autonomy in local governance."). This Court has articulated the extent of home rule as applied to taxes as follows: "[t]he 'home rule' principle seeks to increase government accountability by limited state-level interference in local affairs. This is particularly important with respect to local taxation authority…In this context, it is appropriate for Washington courts to 'liberally construe' legislative grants of power to cities, particularly first class cities." *Watson*, 189 Wn.2d at 166-67 (citations omitted).

Constitutional limits on the State's taxation authority also highlight the extent of the home rule principle. While municipal corporations must be vested with taxation authority from the state,[8] once delegated such

[8] *See Watson*, 189 Wn.2d at 166 ("Municipal corporations have no inherent power to tax.").

authority, *only local governments may levy local taxes*. *Id.* at 166; Wash. Const. art. XI, § 12 ("legislature shall have no power to impose taxes upon counties, cities, towns or other municipal corporations…."). Here, the Legislature has delegated such power of taxation broadly to code cities. By clearly abandoning "Dillon's Rule" and providing the broadest authority of "home rule" for code cities, the Legislature made clear its desire not to limit code city authority, whether through imposition of taxes or otherwise.

C. The history of legislative action and inaction supports upholding the City's tax.

Past legislative activities in 2009 and 2010 relied on by Appellants do not support their position that the City lacks authority to levy excise taxes on the proprietary functions of another municipality under the Optional Municipal Code's express grant of excise taxing authority. App. Br. at 20-21; App. Reply Br. at 7-8. First, these efforts related to additional delegations for specific municipality-on-municipality taxes. Any legislative action for a "*specifically enumerated power"* must, pursuant to RCW 35A.01.010 "*be construed as in addition and supplementary"* to the broad taxing authority granted pursuant to Title 35A RCW. RCW 35A.01.010. Such a construction is consistent with application of the home rule principle.

Second, the 2009 and 2010 legislative activities must be understood in the context of the Court's statement in 2007 in *Burns* that city authority

to tax a municipal utility's proprietary activities was an unresolved question. *Burns v. City of Seattle*¸161 Wn.2d 129, 164 P.3d 475 (2007). Although *Burns* recognized that past precedent "support[ed]" the position that a city has such authority, 161 Wn.2d at 159–60, *Burns* raised the specter of costly litigation should a city decide to levy such a tax. Contrary to Appellants' unsupported conjecture, the desire to avoid litigation was an important factor for the cities lobbying for legislative clarity during this time period. App. Reply Br. at 9, n.6.[9]

Indeed, it is notable that there have not been any legislative efforts in the five years since *Wenatchee* confirmed that governmental immunity is limited to governmental activities and that code cities have authority to tax public utilities' proprietary activities. Under Appellants' own arguments regarding legislative acquiescence to *Algona*, *see* App. Reply Br. at 9, the Legislature has not modified the rule in *Wenatchee*, and has therefore acquiescenced in the *Wenatchee* court's decision on municipal taxing authority. *See State v. Ervin*, 169 Wn.2d 815, 825-26, 239 P.3d 354 (2010) (relying on legislative acquiescence in 2004 Court of Appeals decision). Taken together, the history of legislative activity after *Burns*, followed by

[9] The inferences that can be drawn from this "failed" legislation are further limited by the very nature of the legislative process, which necessarily involves negotiations and compromise between a number of stakeholders, including businesses, cities, special purpose districts, and legislators with their own political agendas.

inaction since *Wenatchee*, supports upholding the City's tax.

D. Abolishing or modifying the governmental/proprietary distinction, even just for taxation purposes, would have extensive and widespread negative consequences.

The Court should not abolish or modify the governmental/proprietary distinction, as it will have significant negative consequences on cities and other municipalities throughout the state including in areas of law outside of taxation. For example, in addition to determining the validity of taxes upon other municipalities, the governmental/property distinction is used to determine (1) whether and to what extent a municipality may be liable for its tortious actions (*Bjork*, 76 Wash. at 228; *Aronson*, 136 Wash. at 316; *Russell*, 39 Wn.2d at 553 (entities could be liable for tortious acts as all were acting proprietary capacity in providing water/sewer utilities)); (2) application of the "public duty doctrine" to alleged tortious activities of a municipal corporation (*Stiefel*, 132 Wn. App. at 529-30 (fire protection services are governmental and public duty doctrine applied to bar claims for failure to supply water for firefighting purposes.)); (3) whether and to what extent a contract with a municipality may be enforceable (*City of Tacoma v. City of Bonney Lake*, 173 Wn.2d 584, 589-90, 269 P.3d 1017 (2012)); and (4) whether two municipal corporations may exercise the same functions within the same area (*Pub. Util. Dist. No. 1 of Pend Oreille Cty. v. Town of Newport*, 38

Wn.2d 221, 227-28, 228 P.2d 766 (1951) (two municipal corporations may exercise proprietary functions at the same time, and thus Town of Newport would not be precluded from operating electrical distribution systems within the Town at the same time as PUD)).

As recognized by this Court, the governmental/proprietary distinction applies to nearly all actions taken by a municipality and is not applied to the entity, but rather by function. *See Okeson*, 150 Wn.2d at 549 ("A municipal corporation is generally considered to act *in one of two capacities* – a governmental capacity or a proprietary capacity.") (emphasis added). The distinction is not applied to the entity, but rather by function. *Id.* at 550-51 (finding that while electric utility is a proprietary function, the specific act of providing streetlights is governmental function). Courts have long distinguished between the governmental[10] functions and the proprietary[11] functions. Importantly, courts have found that the fact that

[10] Courts have found the following as governmental activities: levying taxes (*Burns*¸161 Wn.2d at 150); providing and maintaining streets (*Schoenfeld v. City of Seattle*, 265 F. 726 (W.D. Wash. 1920)); providing and maintaining streetlights (*Okeson*, 150 Wn.2d at 550); providing and maintaining fire hydrants (*Lane*, 164 Wn.2d at 881); granting a franchise and requiring franchise fee for use of public rights-of-way, (*Burns*, 161 Wn.2d at 143); providing solid waste handling and operating a solid waste disposal facility (*Algona*, 101 Wn.2d at 794); eminent domain (*See In re petition of City of Long Beach*, 119 Wn. App. 628, 82 P.3d 259 (2004)); providing fire protection services (*Stiefel*, 132 Wn. App. at 529-30); and construction and maintenance of facilities for public recreation for professional sports team (*Wash. State Major League Baseball Stadium Pub. Fac. Dist. v. Huber, Hunt & Nichols –Kiewit Const. Co.*, 165 Wn.2d 679, 690-93, 202 P.3d 924 (2009)).

[11] Courts have found the following as proprietary: establishing water utility, including setting rates and providing domestic water supply (*Russell*, 39 Wn.2d at 553; *Twitchell*, 55 Wash. at 89; *Stiefel*, 132 Wn. App. at 529-30); establishing sewer utility (*Hayes v. City of Vancouver*, 61 Wash. 536, 539-40, 112 P. 498 (1911); *Stirrat*, 55 Wash. at 566; *Smith v.*

one function is proprietary while another related function is governmental does not transform them into a single capacity. *Stiefel*, 132 Wn. App. at 529-30 (fire hydrants, a governmental function, could not be converted into a proprietary function just because they utilized water lines which were part of the proprietary function of providing domestic water).

Since the governmental/proprietary distinction is based upon the nature of the function at issue, this Court has correctly refused to find that the same function is governmental in one context and proprietary in another. *See, e.g., Okeson*, 150 Wn.2d at 551 ("Providing streetlights cannot be a proprietary function for some purposes, but a governmental function for others."). Appellants would apparently have this Court do just that by abolishing or modifying the distinction for taxation purposes. App. Br. at 25. But Appellants do not offer any rational justification for creating a special exception for taxation purposes only and, as a result, doing so would call into question nearly every aspect of municipal law.

For example, Appellants contention that all of their activities are governmental would create absurd results and difficulties in the context of

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Spokane Cty., 89 Wn. App. 340, 362, 948 P.2d 1301 (1997)); erecting and repairing municipal buildings (gas works, electric light plants, waterworks and the like) (*Pub. Util. Dist. No. 1*, 38 Wn.2d at 227-28); Wash. AGO No. 4 (2012)); establishing and operating city electric utility (*Okeson*, 150 Wn.2d at 550); contracting for sale and delivery of power and light (*Wash. Fruit & Produce Co. v. City of Yakima*, 3 Wn.2d 152, 163 (1940), *opinion adhered to on rehearing*, 103 P.2d 1106; *Burns*, 161 Wn.2d at 145.); and establishing garbage disposal fees (*see Burns*, 161 Wn.2d at 150, *citing Twitchell*, 55 Wash. at 89).

tort liability. If the Court accepts Appellants' arguments, all of their actions would be immune from liability as governmental functions.[12] They would gain an advantage over private companies engaged in the same business enterprise at the expense of tort victims, who would be denied recovery simply because the tortfeasor happened to be a municipality. Washington courts have correctly rejected such an unfair scheme, instead applying the governmental/proprietary distinction for purposes of tort liability. *Stiefel*, 132 Wn. App. at 529-30; *Russell*, 39 Wn.2d at 553; *Bailey v. Town of Forks*, 108 Wn.2d 262, 268, 737 P.2d 1257 (1987), *as amended* (Apr. 28, 1988).

Likewise, Appellants' position would fundamentally change the interpretation and enforceability of municipal contracts, which historically have been treated differently based upon whether the contract is for a proprietary or a governmental function. *Bonney Lake*, 173 Wn.2d at 589-90 (decision to operate a utility and its right to contract was proprietary, but decision to *grant* franchise was governmental). The ongoing validity of municipal contracts would continually be called into question, as legislative bodies have limited authority to "bind" governmental actions of successive legislative bodies.[13] And assuming all activities are deemed governmental

[12] App. Reply Br. at 18 ("Such special purpose governments provide governmental services by definition.") (footnote omitted).

[13] *See* Hugh D. Spitzer, *Realigning the Governmental/Proprietary Distinction in Municipal Law*, 40 Seattle U. L. Rev. 173, 186 (2016) ("State courts have consistently held that governmental regulatory functions could not be contracted away because regulation is so

as Appellants propose, municipalities would not be able to effectively engage in proprietary activities because they would lack the discretion to enter into long-term contracts as permitted under existing law. These results highlight the appropriateness to apply the distinction based upon a review of the function at issue, rather than the entity or result.

IV. CONCLUSION

For the reasons set forth above, *Amici* respectfully request that this Court uphold the decision of the King County Superior Court in this matter, uphold the governmental/proprietary distinction, and uphold the valid excise tax imposed by the City pursuant to RCW 35A.82.020.

Respectfully submitted this 2nd day of December, 2019.

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fundamental to what government (and only government) does….")

CERTIFICATE OF SERVICE

I certify that on the date referenced below, pursuant to agreement of the parties and amici curiae, I served a copy of the foregoing document and the Motion for Leave to file Brief of Amici to each and every attorney of record herein, as identified below, by e-mail:

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CITY OF SPOKANE VALLEY

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Appellate Court Case Number:	96585-4
Appellate Court Case Title:	Lakehaven Water and Sewer District, et al v. City of Federal Way

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